Journal of Air Law and Commerce

Volume 69 | Issue 3 Article 6

2004

Privileges and Immunities Available for Self-Critical Analysis and Reporting: Legal, Practical and Ethical Considerations

Nicole Wolfe Stout

PRIVILEGES AND IMMUNITIES AVAILABLE FOR SELF-CRITICAL ANALYSIS AND REPORTING: LEGAL, PRACTICAL AND ETHICAL CONSIDERATIONS

NICOLE WOLFE STOUT

38TH ANNUAL SMU AIR LAW SYMPOSIUM
FEBRUARY 26-27, 2004
DALLAS, TEXAS

TABLE OF CONTENTS

I. INTRODUCTION

IN RECENT YEARS the courts, legislatures, and regulatory agencies have rendered numerous policy decisions in order to encourage reporting and analysis of aviation incidents in hopes of obtaining the most accurate and complete information necessary to improve and maintain the safety standards of the industry. Qualified privileges and immunities help achieve this compelling public policy goal by guarding those who self-report aviation incidents or violations of federal aviation regulations ("FARs") to the Federal Aviation Administration ("FAA") and those who undertake their own internal investigations of an incident or safety condition that may later give rise to civil litigation. These privileges and immunities shield such information provided or developed in a self-critical nature from being used against the person or corporation later in FAA enforcement actions or civil litigation.

This paper discusses the development of such privileges and immunities–including the self-critical analysis privilege, the Aviation Safety Reporting Program ("ASRP"), the Aviation Safety Action Program ("ASAP"), and the privilege afforded to military investigations and reports for accidents involving military aircraft.

II. THE SELF-CRITICAL ANALYSIS PRIVILEGE: LEGAL, PRACTICAL, AND ETHICAL CONSIDERATIONS

During discovery in a civil case against a corporation, a plaintiff seeks to obtain the corporation's internal investigation documents, which may reveal specific information about the corporation that could be relevant to the plaintiff's case. Is the corporation obligated to produce the documents? One barrier to discovery of such materials is the controversial self-critical

analysis privilege, or self-evaluative privilege, that has gradually developed over the last thirty years. Over this period of time, the public policy need for accurate and complete information concerning safety has become increasingly apparent, and more corporations are expected to self-police their conduct and policies. In recent years, Congress and federal regulatory agencies have increasingly shifted responsibility for monitoring corporations from the public to the private sector.[1] As a result, corporate managers are under more pressure than ever to conduct recurring internal investigations in assessing the corporation's compliance with governmental regulations and mandates, and to keep a handle on ethical and societal expectations of how a corporation should conduct its business.[2] In civil litigation, access to these corporate internal investigations may be permitted and "a self-evaluating corporation will have often unwittingly invested substantial time and financial resources to produce a 'smoking gun' for its opponents in future litigation."[3]

As with any new privilege, the self-critical analysis privilege has numerous and apparent inconsistent variations depending on the jurisdiction, and many courts have outright rejected the privilege.[4] The privilege also varies dramatically depending on the circumstances of each case, and the trend appears to be a narrowing of situations to which the privilege may apply. In cases in which it is asserted, the privilege is raised in response to a discovery request for certain categories of information and specific documents, and to date, does not appear to be an evidentiary issue.[5]

---

[1] *See* Robert J. Bush, *Stimulating Corporate Self-Regulation – The Corporate Self-Evaluative Privilege: Paradigmatic Preferenctialism or Pragmatic Panacea*, 87 NW. U. L. REV. 597 (1993).

[2] *Id.* at 598.

[3] *Id.* at 599.

[4] *See e.g.*, Cloud v. Litton Indus., Inc., 58 Cal. Rptr. 2d 365, 366 (Cal. Ct. App. 1996); Combined Communications Corp. v. Public Serv. Co. of Colo., 865 P.2d 893, 897 (Col. Ct. App. 1993); Siskonen v. Stanadyne, Inc., 124 F.R.D. 610, 612 (W.D. Mich. 1989).

[5] *See* James F. Flanagan, *Rejecting a General Privilege for Self-Critical Analyses*, 51 Geo. Wash. L. Rev. 551, 553 (May 1983). In *Combined Communications. Corp. v. Public Service Co. of Colorado*, 865 P.2d 893 (Col. Ct. App. 1993), the Colorado Public Service Commission unsuccessfully asserted the self-critical analysis privilege as a basis for arguing that a jury considered inadmissible evidence during the trial.

A. History of the Self-Critical Analysis Privilege

The self-critical analysis privilege was first established in a federal district court in a medical malpractice case, *Bredice v. Doctor's Hospital*,[6] in the context of internal self-investigations and evaluations of hospitals and medical facilities. In that case, the plaintiff sought production of minutes and reports from the board and committees of the defendant hospital and any other reports concerning the death of plaintiff's decedent.[7] The meetings held by the board and committees of the hospital were pursuant to the Joint Commissions on Accreditation of Hospitals, which is a private entity that sets standards for the accreditation of hospitals.[8] Pursuant to the regulations, the sole purpose of such meetings was the improvement of care and treatment.[9] The court held that the overwhelming public need for such self-evaluations of hospitals warranted the confidentiality of such evaluations, and stated the following:

> Confidentiality is essential to effective functioning of these staff meetings; and these meetings are essential to the continued improvement in the care and treatment of patients. Candid and conscientious evaluation of clinical practices is a *sine qua non* of adequate hospital care. To subject these discussions and deliberations to the discovery process, without a showing of exceptional necessity, would result in terminating such deliberations. Constructive professional criticism cannot occur in an atmosphere of apprehension that one doctor's suggestion will be used as a denunciation of a colleague's conduct in a malpractice suit.[10]

The court noted that meetings "retrospective with the purpose of self-improvement" are entitled to a qualified privilege on the basis of the "overwhelming public interest."[11] Many state legislatures have codified the privilege to protect the discoverability of certain medical peer reviews, while some courts have restricted documents included in the medical peer review privilege to only those documents specified by the legislature.[12]

Although the privilege was first established in the context of medical peer reviews, it was expanded by another federal court

---

[6] 50 F.R.D. 249 (D.D.C. 1970), *aff'd*, 479 F.2d 920 (D.C. Cir. 1973).

[7] *Id.* at 249.

[8] *Id.* at 250.

[9] *Id.*

[10] *Id.* at 250.

[11] *Id.* at 251.

[12] *See, e.g.*, Konrady v. Oesterling, 149 F.R.D. 592, 598 (D. Minn. 1993); *ex parte* Cryer v. Corbett, 814 So. 2d 239, 249 (Ala. 2001).

to include internal corporate evaluations of employment practices in *Banks v. Lockheed-Georgia, Co.*[13] In *Banks*, the plaintiff, who alleged employment discrimination, sought internal reports prepared by employees of Lockheed-Georgia, a defense contractor, regarding the company's compliance with Title VII[14] and Executive Order 11,246.[15] The applicable regulations required certain government contractors to develop a written affirmative action compliance program based on detailed guidelines.[16] The court prevented disclosure of the documents, reasoning that it would be contrary to public policy to permit access to the internal materials because such access would "discourage frank self-criticism and evaluation in the development of affirmative action programs of this kind."[17] The court, however, required Lockheed-Georgia to produce all "factual and statistical information" that was available to it at the time that the study was conducted.[18]

Since *Banks*, many federal and state courts have applied the privilege to similar internal assessments of employment practices in employment discrimination suits,[19] while others have rejected it.[20] Courts and legislatures have further expanded the

---

[13] 53 F.R.D. 283, 285 (N.D. Ga. 1971).

[14] Title VII, which is now codified at 42 U.S.C. § 2000e *et. seq.*, was enacted as part of the Civil Rights Act of 1964. Title VII makes it unlawful for a private employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin." *See* 42 U.S.C. § 2000e-2(a)(1) (2004).

[15] Executive Order 11,246, dated September 24, 1965, enunciated a policy of equal employment opportunity in government employment by federal contractors and subcontractors and federally assisted construction contracts regardless of race, creed, color, or national origin. Exec. Order 11,246, 30 Fed. Reg. 12,319 (Sept. 24, 1965). Executive Order 11,375, dated October 13, 1967, amended Executive Order 11,246 to include discrimination on the account of sex. *See* Exec. Order No. 11,375, 32 Fed. Reg. 14,303 (Oct. 13, 1967).

[16] *See* 41 C.F.R. § 60-2.10–2.18 (2004).

[17] *Banks v. Lockheed-Ga. Co.*, 53 F.R.D. at 285.

[18] *Id.*

[19] *See, e.g.*, Joiner v. Hercules, Inc., 169 F.R.D. 695, 699 (S.D. Ga. 1996); O'Connor v. Chrysler Corp., 86 F.R.D. 211, 218 (D. Mass. 1980); Trezza v. Hartford, Inc., No. Civ. 2205, 1999 WL 511673, at *3 (S.D.N.Y. July 20, 1999); Troupin v. Metropolitan Life Ins. Co., 169 F.R.D. 546, 550 (S.D.N.Y. 1996); Clarke v. Mellon Bank, No. Civ. A92-CV-4823, 1993 WL 170950 (E.D. Pa. May 11, 1993); Penk v. Oregon State Bd. of Higher Educ., 99 F.R.D. 506, 507 (D. Or. 1982).

[20] *See, e.g.*, Abdallah v. Coca-Cola Co., No. Civ. A198-CV-3679, 2000 WL 33249254, at *7 (N.D. Ga. Jan. 25, 2000); Johnson v. UPS, Inc., 206 F.R.D. 686, 693 (M.D. Fla. 2002); Tharp v. Sivyer Steel Corp., 149 F.R.D. 177, 185 (S.D. Iowa 1993); Webb v. Westinghouse Elec. Corp., 81 F.R.D. 431, 436 (E.D. Pa. 1978).

privilege to shield from discovery police department and government internal investigative documents.[21] In this context, it is often referred to as the "deliberative privilege."[22] Some courts have even applied the self-critical analysis privilege to a corporation's internal investigations regarding environmental issues,[23] product liability cases,[24] and developmental research of institutional bodies.[25]

The United States Supreme Court, in *University of Pennsylvania v. E.E.O.C.*,[26] dampened the expansion of the privilege, although the Court did not expressly address the viability of the self-critical analysis privilege. In that case, the EEOC sought faculty peer review documents during its investigation of a sexual discrimination charge by one of the University's professors. The University claimed the documents were privileged because they contained "confidential peer review information."[27] The Court, however, refused to create a privilege for peer review documents primarily because Congress specifically did not create such a privilege in Title VII.[28] The Court stated that federal courts should not exercise their authority to create privileges "expansively."[29] Notably, in this case, the government, rather than a private litigant, was the party seeking disclosure of the documentation. The decision shows that in balancing disclosure and the need for confidentiality, courts will justifiably find that the government's need for the information outweighs the need for confidentiality. The rationale for this is that the government has the onus of creating and enforcing its regulations,

---

[21] *See, e.g., In re* Sealed Case, 856 F.2d 268, 272 (D.C. Cir. 1988); Kay v. Pick, 711 A.2d, 1251, 1256 (D.C. App. 1998); Polypropylene Carpet Antitrust Litig., 181 F.R.D. 680 (N.D. Ga. 1998); Thompson v. Lynbrook Police Dep't, 172 F.R.D. 23, 27 (E.D.N.Y. 1997) (applying deliberative privilege to district attorney's files). *But see* City of Hemet v. Superior Court, 44 Cal. Rptr. 2d 532 (Cal. Ct. App. 1995) (rejecting protection of police department internal report).

[22] The deliberative process privilege is frequently invoked by government agencies seeking to protect from discovery internal reports and materials. "Generally, it protects an agency from disclosing confidential deliberations of law or policymaking, reflecting opinions, recommendations, or advice." Myers v. Uniroyal Chem. Co, No. Civ.A.916716, 1992 WL 97822, at *4 (E.D. Pa. May 5, 1992).

[23] *See* Reichold Chem., Inc. v. Textron, Inc., 157 F.R.D. 522, 527 (N.D. Fla. 1994).

[24] *See* Shipes v. BIC Corp., 154 F.R.D. 301, 307 (M.D. Ga. 1994).

[25] *See* Plough, Inc. v. Nat'l Acad. of Scis., 530 A.2d 1152 (D.C. App. 1987).

[26] 493 U.S. 182 (1990).

[27] *Id.* at 186-88.

[28] *Id.* at 189.

[29] *Id.*

and corporations should not be able to avoid Title VII or other regulations by preventing the government's access to such documents. Despite the Supreme Court's decision in *University of Pennsylvania,* the self-critical analysis is still viable in federal courts to varying degrees.[30]

B. Rationale for the Privilege—The "Chilling Effect" of Disclosure

The rationale for the self-critical analysis lies in the possible "chilling effect" that disclosure of corporate internal investigations may have upon an industry's or corporation's future attempts to monitor and improve safety.[31] One court explained the rationale aptly by stating:

> The underlying principle is that if a party has conducted a confidential analysis of its own performance in a matter implicating a substantial public interest, with a view towards correction of errors, the disclosure of that analysis in the context of litigation may deter the party from conducting such a candid review in the future.[32]

The concern is that disclosure of such documents reflecting candid self-evaluations by corporations "will deter or suppress socially useful investigations and evaluations or compliance with the law or with professional standards."[33] The self-critical analysis privilege may encourage corporations to continually monitor safety measures and operations, with a view toward correcting mistakes and minimizing safety without fear that these efforts would later be used against them in civil litigation.[34]

---

[30] *See* Reid v. Lockheed Martin Aeronautics Co., 199 F.R.D. 379 (N.D. Ga. 2001) (discussing, in the context of a Title VII case, in which a private litigant sought internal corporate analysis of employment discrimination, the viability of the self-critical analysis privilege despite the Supreme Court's ruling in *University of Pennsylvania*). The *Reid* court reasoned that the Supreme Court's decision demonstrates that the application of privileges pursuant to Rule 501 should be decided on a case-by-case basis. *Id.* at 384. Other courts have interpreted the *University of Pennsylvania* decision to exclude the self-critical analysis only in the context of employment discrimination. *See, e.g.,* Johnson v. UPS., Inc., 206 F.R.D. 686, 693 (2002).

[31] *See* Todd v. S. Jersey Hosp. Sys., 152 F.R.D 676, 682 (D. N.J. 1993), *rev'd on the grounds,* 960 F. Supp. 835 (D. N.J. 1997); Brunt v. Hunterdon County 183 F.R.D. 181, 185 (D.N.J. 1998).

[32] Wimer v. Sealand Servs., Inc., No. 96-CV-8730, 1997 WL 375661, at *1 (S.D.N.Y. July 3, 1997) (citing Chem. Bank v. Affiliated FM Ins. Co., Nos. 87 Civ. 0150 (VLP) *et seq.*, 1994 WL 89292, at *1 (S.D.N.Y. Mar. 16, 1994).

[33] Hardy v. New York News, Inc., 114 F.R.D. 633, 640 (S.D.N.Y. 1987).

[34] *See* Hickman v. Whirlpool Corp., 186 F.R.D. 362, 363 (N.D. Ohio 1999).

To protect disclosure of a corporation's safety measures, a federal district court found this rationale for the self-critical analysis privilege compelling in *Hickman v. Whirlpool Corp.*[35] In that case, a worker brought suit against Whirlpool for personal injuries related to an industrial accident.[36] The plaintiff sought minutes from Whirlpool's proactive safety team and a plant safety report prepared by one of Whirlpool's employees.[37] The court held that Whirlpool would not be compelled to produce the documents because the documents contained self-critical analysis, and that "the public has a strong interest in preserving this type of data collection and dialog within industries."[38] The court reasoned that disclosure would do "great damage" to Whirlpool's efforts to improve safety and to the industry as a whole, and public policy favored such efforts in order to improve safety.[39]

C. Current Contours of the Privilege

The self-critical analysis privilege has led a "checkered existence."[40] The privilege is widely regarded as ambiguous because courts have neither uniformly adopted nor rejected the privilege.[41] A survey of the case law in federal courts concerning the privilege shows that such a characterization is accurate. Although some courts reject the privilege,[42] the customary treatment of the privilege is much more ambiguous. More often than not, courts considering the privilege reject its application while impliedly accepting that the privilege may apply under different circumstances. The result has been an overall narrowing of the privilege as federal courts consider it on a case-by-case basis. Although most decisions involving the privilege arise in

---

[35] *Id.* at 364.

[36] *Id.* at 363.

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] Wimer v. Sealand Serv., Inc., No. 96-CV-8730, 1997 WL 375661, at *1 (S.D.N.Y. July 3, 1997).

[41] *See* Holland v. Muscatine Gen. Hosp., 971 F. Supp. 385, 390 (S.D. Iowa 1997); Abdallah v. Coca-Cola Co., No. Civ. A198-CV-3679, 2000 WL 33249254, at *5 (N.D. Ga. Jan. 25, 2000).

[42] *See, e.g.*, Robbins & Myers, Inc. v. J.M. Huber Corp., No. 01-CV-0201, 2003 WL 21384304, at *4 (W.D.N.Y. May 9, 2003); Hawthorne Land Co. v. Occidental Chem. Corp., No. Civ. A 01-0881, 2003 WL 21510426, at *1 (E.D. La. June 24, 2003); Williams v. Vulcan-Hart Corp., 136 F.R.D. 457, 460 (W.D. Ky. 1991).

federal district courts, some United States Courts of Appeals have explicitly recognized the privilege.[43]

At least one court has held that the criteria needed to qualify for the self-critical analysis privilege varies according to the type of case in which it is asserted. The District Court for the Northern District of Illinois in *Tice v. American Airlines, Inc.*[44] held that two distinct formulations have emerged for cases involving employment discrimination and personal injury cases. There is a "fundamental difference between tort cases, which involve voluntary self-evaluations designed to enhance *safety*, and discrimination cases, which involve the fairness of disclosing documents written pursuant to a legal mandate."[45] Although this analysis is simplistic given the numerous situations in which self-evaluations are performed to enhance safety, the companies performing such self-evaluations are heavily regulated, as in the aviation context. In *Tice*, the self-critical analysis privilege was successfully asserted to prevent disclosure of American Airlines' safety reports.[46]

Rule 26(b)(1) of the Federal Rules of Civil Procedure provides that "[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the action."[47] Rule 501 of the Federal Rules of Evidence, which governs issues of privileges in federal courts, provides the following in pertinent part:

> [E]xcept as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege . . . shall be determined in accordance with State law.[48]

---

[43] *See* ASARCO, Inc., Tenn. Mines Div. v. N.L.R.B., 805 F.2d 194 (6th Cir. 1986); *In re* Burlington N., Inc., 679 F.2d 762, 765 (8th Cir.).

[44] 192 F.R.D. 270, 272 (N.D. Ill. 2000).

[45] *Id.* at 273 (citing Morgan v. Union Pac. R.R., 182 F.RD. 261, 266 (N.D. Ill. 1996).

[46] *Id.*

[47] FED. R. CIV. P. 26(b)(1).

[48] FED. R. EVID. 501. In cases that involve pendant state law claims in a federal question case, federal common law regarding privileges applies. *See* S. Rep. No. 1277, 93 *reprinted in* 1974 U.S.C.C.A.N. 7051, 7075 n.16.

The liberality of Rule 501 gives federal courts the discretion to recognize privileges under federal common law "in light of reason and experience" in cases where Congress has not acted and which state law does not supply the rule of decision.[49] The recognition of new privileges in federal court thus evolves on a case-by-case basis.[50] Although the development of privileges under federal common law is pragmatic, the analysis begins with the "fundamental principle that 'the public has a right to every man's evidence.'"[51] Of course, if a claim or defense is based on state law, the question of privilege is determined in accordance with state law. Many federal courts examining whether to apply the self-critical analysis privilege in the context of a state law claim consider whether the applicable state would recognize the privilege if there are no state court decisions addressing the privilege.[52]

Ordinarily, determining whether the materials sought are relevant marks the starting point in the analysis of a discovery dispute. Generally, the relevancy of the documents in question is established because the documents pertain to pre-incident safety meetings and reports; post-accident investigation, meetings and reports; or routine internal investigations undertaken in the process of preparing a government-mandated report. It is important to note that the privilege may also be asserted by a third-party to the litigation who receives a subpoena duces tecum.[53]

Once relevancy is established, the court must determine (1) whether the particular jurisdiction recognizes the privilege, whether it be state law or federal common law, and if so, (2) whether the privilege will be recognized under the particular circumstances of the case. When the dispute arises, and the party seeking protection of documents claims the self-critical analysis privilege, many courts view the disputed documents *in*

---

[49] *See* Cloud v. Litton Indus., Inc., 58 Cal. Rptr. 2d 365, 379 (Cal Ct. App. 1996).

[50] *See* Jaffee v. Redmond, 518 U.S. 1, 8 (1996); Holland v. Muscatine Gen. Hosp., 971 F. Supp. 385, 388-89 (S.D. Iowa 1997).

[51] Univ. of Pa. v. EEOC, 493 U.S. 182, 189 (1990) (quoting Trammel v. United States, 445 U.S. 40, 50 (1980)).

[52] *See, e.g.*, Williams v. Vulcan-Hart Corp., 136 F.R.D. 457, 458 (W.D. Ky. 1991); Siskonen v. Standyne, Inc., 124 F.R.D. 610, 612 (W.D. Mich. 1989).

[53] *See In re* Health Mgmt., Inc., No. CV 96-0889, 1999 WL 33594132, at *7 (E.D.N.Y. Sept. 25, 1999) (upholding privilege asserted by third party to litigation). *But see* LeClere v. Mut. Trust Life Ins. Co., No. C99-0061, 2000 WL 34027973, at *1 (N.D. Iowa June 14, 2000).

camera before ruling whether the documents are protected by the privilege.[54]

In *Dowling v. American Hawaii Cruises, Inc.*,[55] the Ninth Circuit articulated the most often cited criteria that must be established by the party seeking protection:

> First, the information must result from a critical self-analysis undertaken by the party seeking protection; second, the public must have a strong interest in preserving the free flow of information respecting the subject matter; third, the information must be of the type that the free flow would cease if the privilege is not recognized. Lastly, any document produced as a result of the self-critical analysis must be produced in the expectation of confidentiality and it must actually have been kept confidential.[56]

As discussed below, many courts have held that in order to be protected, the self-critical document must have also been created or prepared pursuant to a government mandate.

1. *Facts and Data Are Not Protected*

The requirement that the documents protected must qualify as self-analysis conducted by the party seeking protection limits the application of the privilege to only self-evaluative or subjective analysis of data. Facts and objective data are not included in the ambit of the privilege.[57] For example, an investigative report prepared by a ship's crewmembers after an incident involv-

---

[54] *See* Gatewood v. Stone Container Corp., 170 F.R.D. 455, 459 (S.D. Iowa 1996).

[55] 971 F.2d 423, 425-426 (9th Cir. 1992). *But see* Union Pac. R.R. v. Mower, 219 F.3d 1069, 1076 (9th Cir. 2000) (stating that the Ninth Circuit has never adopted the privilege).

[56] *See Dowling*, 971 F.2d at 426; MCI Worldcom Network Servs., Inc. v. Von Behren Elec., Inc., No. Civ. A.1:00CV3311, 2002 WL 32166535, at *3 (N.D. Ga. May 21, 2002); Reid v. Lockheed Martin Aeronautics Co., 199 F.R.D. 379, 386 (N.D. Ga. 2001). Other courts have articulated a different although similar four-prong test:

> (1) the materials must have been prepared for mandatory government reports; (2) the privilege extends only to subjective evaluative materials; (3) the privilege does not extend to objective data in any such reports; and (4) discovery should be denied only where the public policy favoring exclusion clearly outweighs the plaintiff's need.

See Kern v. Univ. of Notre Dame Du Lac, No. 3:96-CV-406, 1997 WL 816518, at *8 (N.D. Ind. Aug. 12, 1997); Roberts v. Carrier Corp., 107 F.R.D. 678, 684 (N.D. Ind. 1985); Wittingham v. Amherst Coll., 164 F.R.D. 124, 129 (D. Mass. 1995).

[57] *See, e.g.*, Steinle v. Boeing Co., No. 90-1377, 1992 WL 53752, at *7 (D. Kan. Feb. 4, 1992); *Kern*, 1997 WL 816518 at *8; *Roberts*, 107 F.R.D. at 684; Freiermuth v. PPG Indus., Inc., 218 F.R.D. 694, 698 (N.D. Al. 2003).

ing one of the ship's crew was held to be primarily factual while recommendations for corrective action would arguably be within the privilege.[58] Where the documents at issue contain a combination of factual and subjective analysis, courts applying the privilege will order the party to produce only those portions of the documents that are factual or statistical data.[59] A court may require an *in camera* inspection under these circumstances.

2. Public Interest in the Subject Matter

In order for the privilege to apply, the public must have a strong interest in preserving the free flow of information respecting the subject matter, since the privilege is intended to "serve the public interest by encouraging self-improvement through uninhibited self-analysis and evaluation."[60] The privilege exists "out of concern for the public and is not personal to the one asserting the privilege."[61] One court found little public concern where a corporation's investigation into employee misconduct exhibited its self-interested incentives in investigating employee wrongdoing, thereby eliminating the need for additional protection to encourage such investigations.[62] Similarly, a corporation's investigation into a particular claim generally does not qualify as privileged self-critical analysis. For example, if a plaintiff seeks documents regarding the defendant's investigation of the plaintiff's particular claim, courts will not allow such documents to be protected from disclosure by the privilege because the public does not have a strong interest in an investigation of a specific claim especially considering that the documents are extremely relevant to plaintiff's claim.[63] In this

---

[58] Wimer v. Sealand Service, Inc., No. 96-CIV-8730, 1997 WL 375661, at *2 (S.D.N.Y. July 3, 1997). In many cases, post-accident investigations will be covered by the work product doctrine if the investigations were conducted in anticipation of litigation.

[59] Penk v. Or. State Bd. of Higher Educ., 99 F.R.D. 506, 507 (D. Or. 1982).

[60] *In re* Crazy Eddie Sec. Litig., 792 F. Supp. 197, 205 (E.D.N.Y. 1992).

[61] Warren v. Legg Mason Wood Walker, Inc., 896 F. Supp. 540, 543 (E.D.N.C. 1995) (requiring disclosure of a broker's audit reports in an action by an investor against a security broker); Ludwig v. Pilkington N.A., Inc., No. 03C1086, 2004 WL 1898238, *1 (N.D. Ill. Aug. 13, 2004).

[62] *See* Cruz v. Coach Stores, Inc., 196 F.R.D. 228, 232 (S.D.N.Y. 2000).

[63] *See* Wittingham v. Amherst Coll., 164 F.R.D. 124, 129-30 (D. Mass. 1995); Myers v. Uniroyal Chem. Co., CIV. A. No. 916716, 1992 WL 97822, at *4 (E.D. Pa. May 5, 1992); *but see* ASARCO, Inc., Tenn. Mines Div. v. N.L.R.B., 805 F.2d 194, 200 (6th Cir. 1986); Trezza v. Hartford Co., Inc., No. 98 CIV. 2205, 1999 WL 511673 at *3 (S.D.N.Y. July 20, 1999) (holding that internal investigations focused on addressing plaintiff's concerns were protected by the self-critical analy-

context, the party seeking protection may have a valid work-product claim depending on the jurisdiction and particular circumstances surrounding the creation of the disputed document. Courts have, however, found strong public policy interests in internal employer evaluations of employment discrimination[64] and medical peer reviews.[65]

3. *Applies Only If Disclosure Would Stifle Analysis*

The privilege will only be applied where disclosure would stifle or cramp self-evaluations in the future. At least one court has stated that self-evaluations by companies will continue in the absence of such a privilege due to their need to remain competitive.[66] However, most courts that acknowledge the privilege find that disclosure would "curtail or hinder" future self-evaluation by that company or the industry as a whole, which is a concern that warrants protection.[67] Whether routine safety internal investigations would be stifled in the future if disclosed is unclear. Some courts have held that such internal investigations would be stifled by disclosure, thus warranting protection,[68] while others hold that voluntary routine safety reviews would not be affected by disclosure because corporations may continue self-evaluations to remain competitive in the marketplace and because of other self-interested reasons.[69]

---

sis privilege). Under the appropriate circumstances, however, such investigations may be protected by the work product doctrine.

[64] Troupin v. Metro. Life Ins., 169 F.R.D. 546, 550 (S.D.N.Y. 1996); Clarke v. Mellon Bank, No. CIV. A-92-CV-4823, 1993 WL 170950, at *4 (E.D. Pa. May 11, 1993); John v. Trane Co., a Div. of Am. Standard, Inc., 831 F. Supp. 855, 856 (S.D. Fla. 1993); Robbins v. Provena St. Joseph Med. Ctr., No. 03 C 1371, 2004 WL 502327, *2 (N.D. Ill. Mar. 11, 2004).

[65] Brem v. Decarlo, Lyon, Hearn, Pazourek, P.A., 162 F.R.D. 94, 102 (D. Md. 1995); Weekoty v. United States, 30 F. Supp. 2d 1343, 1348 (D.N.M. 1998) (upholding assertion by United States that morbidity and mortality conferences among governmental physicians are protected by the self-critical analysis privilege).

[66] Williams v. Vulcan-Hart Corp., 136 F.R.D. 457, 459 (W.D. Ky. 1991). *See also* James F. Flanagan, *Rejecting A General Privilege for Self-Critical Analyses*, 51 GEO. WASH. L. REV. 551, 561 (1983) ("Failure [of a company] to critically review its performance inevitably leads to misperceptions about the market, and within a short time, penalties from the marketplace.").

[67] *See, e.g.*, Hickman v. Whirlpool Corp., 186 F.R.D. 362, 364 (N.D. Ohio 1999); *Troupin*, 169 F.R.D. at 549.

[68] *See Hickman*, 186 F.R.D. at 364.

[69] *See* Freiermuth v. PPG Indus., Inc., 218 F.R.D. 694, 697-698 (N.D. Al. 2003). As the court noted:

4. Confidentiality Required

In order for the privilege to be sustained, the targeted documents must have been kept confidential. If the evaluations or reports alleged to be protected were prepared by an outside consulting company, they may not be within the protection of the privilege.[70] Likewise, documents that contain information available to the public in another form is not protected.[71] Documents likely to be protected include those prepared with the intention of being kept confidential and those circulated on a "need to know" basis.[72] Where the self-critical analysis is not required to be governmentally mandated, the confidentiality issue may be problematic because disclosing documents and information to the government reduces the likelihood that the report and its contents will be kept confidential.[73]

5. Government Mandated Reporting

Many courts, but not all, have held that the foundation of the self-critical analysis privilege is the protection of documents that comply with a mandatory governmental requirement.[74] This is

---

> The policy arguments espoused in support of recognizing a self-critical analysis privilege in the employment context ring hollow in this post-Enron era where corporate governance is not only expected, but *en vogue.* Today, companies employ more compliance personnel than ever before for the very purpose of self-evaluating compliance with various state and federal laws. Failure to engage in self-critical analysis would be considered irresponsible by shareholders in today's environment. Cloaking self-evaluative materials in privilege would be contrary to this climate of corporate *glasnost.*

Id. (citations omitted). *See also* Powell v. The New York City Health and Hosp. Corp., No. 03 Civ. 3264 LTS DF, 2003 WL 22871908, at *2 (S.D.N.Y. Dec. 4, 2003).

[70] Etienne v. Mitre Corp., 146 F.R.D. 145, 148 (E.D. Va. 1993) (holding that there was no confidential relationship to protect because portions of the compliance reviews sought to be protected were performed by an outside consulting firm).

[71] Spencer v. Sea-Land Serv., Inc., No. 98 CIV. 2817, 1999 WL 619637, at *549 (S.D.N.Y. Aug. 16, 1999) (requiring defendant to produce recommendations for corrective safety measures because the identical recommendations were contained in a document available to the public).

[72] *Troupin,* 169 F.R.D. at 549.

[73] *See* Reid v. Lockheed Martin Aeronautics Co., 199 F.R.D. 379, 387 (N.D. Ga. 2001) (holding that information mandated by a government agency lessens any reasonable expectation that the information would remain confidential).

[74] *See, e.g.*, No. 90-1377, 1992 WL 53752, at *7 (D. Kan. Feb. 4, 1992); Sabratek Liquidating LLC v. KPMG, LLP, No. 01-C-9582, 2002 WL 31520993, at *3 (N.D. Ill. Nov. 13, 2002); Kern v. Univ. of Notre Dame Du Lac, No. 3:96-CV-406, 1997 WL 816518, at *8 (N.D. Ind. Aug. 12, 1997); Roberts v. Carrier Corp., 107 F.R.D.

so because courts recognizing the privilege "perceived unfairness in a rule that would allow the government to require companies to engage in self-critical analysis and then hand that analysis over to plaintiff litigants as ammunition."[75] Therefore, many courts hold that only those documents that were specifically created or generated for the purpose of making a required report to a governmental agency could fall within the privilege. One court has stated, "the privilege protects only those evaluations that the law requires one to make."[76] For example, if a corporation prepares a document in the regular course of business and later submits that document to a governmental agency, the document would not be protected. Generally, in jurisdictions imposing this requirement, only those documents prepared for submission to the government will be protected. This requirement seems to contradict the purpose of the privilege, i.e. to encourage self-critical evaluations, because if an evaluation is mandatory, disclosure cannot stifle such evaluations although it may affect the validity or accuracy of the reports to the government. Some courts that do not impose this requirement have held that *voluntary* internal studies may fall within the ambit of the privilege although they were not mandated by a government agency.[77]

6. *Balancing of Interests*

Even in cases where the criteria outlined by the Ninth Circuit in *Dowling*—or a variation of those requirements—are satisfied, federal courts take a balancing approach. In order for the privilege to apply, "the need for disclosure must be outweighed by the interests served in preventing disclosure."[78] This balancing approach, which seems to be inherent in the privilege, regard-

678, 684 (N.D. Ind. 1985); Paladino v. Woodloch Pines, Inc., 188 F.R.D. 224, 225 (M.D. Pa. 1999); Hoffman v. United Telecomm., Inc., 117 F.R.D. 440, 443 (D. Kan. 1987); Corbin v. Weaver, 680 P.2d 833, 840 (Ariz. Ct. App. 1984).

[75] Hardy v. New York News Inc., 114 F.R.D. 633, 641 (S.D.N.Y. 1987).

[76] *Roberts*, 107 F.R.D. at 684.

[77] Trezza v. Hartford Co., No. 98 CIV. 2205, 1999 WL 511673, at *3 (S.D.N.Y. July 20, 1999); Flynn v. Goldman, Sachs & Co., No. 91 Civ. 0035, 1993 WL 362380, at *2 (S.D.N.Y. Sept. 16, 1993).

[78] Gatewood v. Stone Container Corp., 170 F.R.D. 455, 459 (S.D. Iowa 1996). In *Gatewood*, the court cites to the Supreme Court's decision in *University of Pennsylvania v. EEOC*, 493 U.S. 182, 189 (1990), wherein the Court stated that it does not "apply an evidentiary privilege unless it promotes sufficiently important interests to outweigh the need for probative evidence . . . ." *University of Pennsylvania*, 493 U.S. at 189.

less of whether the courts discuss it or not, explains why the privilege is often referred to as a "qualified" or "limited" privilege. The balancing of public and private interests have become key considerations when a court decides whether an asserted privilege should prevent disclosure of relevant information.[79] In balancing these interests, one court found that disclosure of "affirmative action plans or other equal employment compliance documents (would not) have a 'chilling effect' upon employers' self-evaluations or discourage employers from frank reflection in those reports required by the federal government."[80] This same court reasoned that disclosure of such information plays a "crucial function in civil litigation to eradicate discrimination in the workplace."[81] Thus, the outcome of courts' balancing of the interests are often determined by the court's view of the rationale and origins of the privilege.

The development of the privilege in the federal and state courts differs primarily because Rule 501 of the Federal Rules of Evidence varies significantly from state rules of evidence. State rules of evidence are often more restrictive and prohibit state courts from creating new privileges not specifically provided for by the state legislature.[82] This distinction is consistent with the trend of development of the self-critical analysis privilege, which, if accepted at all, seems to remain more narrow and restrictive in the state courts. State courts have applied the privilege to medical peer reviews or hospital committee reviews,[83] internal memoranda regarding efforts to comply with governmental mandated affirmative action requirements,[84] documents relating to a medical licensing board's investigation,[85] reports

---

[79] *Etienne v. Mitre Corp.*, 146 F.R.D. at 147.

[80] Tharp v. Sivyer Steel Corp., 149 F.R.D. 177, 182 (S.D. Iowa 1993).

[81] *Id.* at 184. *See also* Clarke v. Mellon Bank, No. CIV.A-92-CV-4823, 1993 WL 170950, *4 (E.D. Pa. May 11, 1993) (holding disclosure of affirmative action plans "would discourage voluntary compliance and that the public policy against disclosure outweighed the plaintiff's need for these materials").

[82] *See* Cloud v. Litton Indus., Inc., 58 Cal. Rptr. 2d 365, 369 (Cal. Ct. App. 1996); *see also* Valley Bank of Nev. v. Super. Ct., 542 P.2d 977, 978-979 (Cal. Ct. App. 1975) (stating that "[t]he privileges contained in the [California] Evidence Code are *exclusive* and the courts are not free to create new privileges as a matter of judicial policy") (emphasis added).

[83] *See, e.g.*, Riverside Hosp., Inc. v. Garza, 894 S.W.2d 850, 855 (Tex. App.-Dallas 1995, no writ) (upholding statutory application of self-critical analysis in medical malpractice case).

[84] *See, e.g.*, Anderson v. Hahnemann Med. Coll. & Hosp. of Phila., 14 Phila. Co. Rptr. 114, 117 (Phila. Ct. of C. P. 1985).

[85] *See, e.g.*, McClain v. Coll. Hosp., 492 A.2d 991, 998 (N.J. 1985).

pertaining to post-accident internal investigations,[86] and documents pertaining to a healthcare provider's quality assurance program.[87] The privilege has been rejected in cases where parties seek to prevent disclosure of reports to the Consumer Product Safety Commission in products liability cases,[88] post-morbid hospital investigations,[89] medical peer reviews,[90] and numerous other situations. State courts that accept the privilege apply it inconsistently because there are no specific categories of documents that are considered privileged in all cases. For example, one court may hold that post-morbid hospital reviews are protected while another court may hold that they are not.

D. When the Government Seeks Disclosure

The privilege is universally rejected when it is the government that seeks the documents claimed to contain self-critical analysis.[91] In almost every case where a party has claimed the self-critical analysis privilege in response to a government subpoena for records, the courts refused to apply the privilege. Courts have rejected the privilege in *qui tam* actions by private citizens on behalf of the government pursuant to the False Claims Act,[92] prosecutions for securities fraud,[93] grand jury investigations related to Federal Drug Administration (FDA) violations,[94] and administrative subpoenas by the Department of Defense against

---

[86] *See, e.g.*, Wylie v. Mills, 478 A.2d 1273, 1278 (N.J. Super. 1984), *rev'd on other grounds*, 691 A.2d 321 (N.J. 1997).

[87] *See, e.g.*, Beverly Enters-Fla., Inc. v. Ives, 832 So. 2d 161, 162 (Fla. Ct. App. 2002).

[88] Lamitie v. Emerson Elec. Co.—White Rogers Div., 142 A.D.2d 293 (N.Y. App. Div. 1988); Scroggins v. Uniden Corp. of Am., 506 N.E.2d 83, 86 (Ind. Ct. App. 1987).

[89] Reyes v. Meadowlands Hosp. Med. Ctr., 809 A.2d 875, 882 (N.J. Super. 2001).

[90] Cloud v. Litton Indus., Inc., 58 Cal. Rptr. 2d 365, 369 (Cal. Ct. App. 1996).

[91] *See, e.g.*, FTC v. TRW, Inc., 628 F.2d 207, 210 (D.C. Cir. 1980); *see also* Emerson Elec. Co. v. Schlesinger, 609 F.2d 898 (8th Cir. 1979); United States v. Noall, 587 F.2d 123 (2d Cir. 1978); Reynolds Metals Co. v. Rumsfeld, 564 F.2d 663, 667 (4th Cir. 1977); *In re* Kaiser Alum. & Chem. Co., 214 F.3d 586, 593 (5th Cir. 2000).

[92] *See, e.g.*, United States. v. QHG of Ind., Inc., No. 1:97-CV-N4, 1998 WL 1756728, at *1 (N.D. Ind. Oct. 8, 1998); United States v. Southern Bell Tel. & Tel. Co, 915 F. Supp. 308, 313 (N.D. Fla. 1996); United States v. Allison Engine Co., 196 F.R.D. 310, 315 (S.D. Ohio 2000).

[93] *In re* Shalen & Assocs., No. 89-6308-CIV, 1990 WL 284508, at *1 (S.D. Fla. Nov. 5, 1990).

[94] *In re* Grand Jury Proceedings, 861 F. Supp. 386 (D. Md. 1994).

a government contractor.[95] One federal court noted that this limitation of the self-critical analysis privilege "makes sense in light of the roots of the privilege in the public interest, and the strong public interest in having administrative investigations proceed expeditiously and without impediment."[96] As a practical matter, the self-critical analysis privilege cannot be successfully raised in light of a subpoena from a governmental agency.

E. Products Liability Claims

The privilege may be used to protect a manufacturer's testing and analysis documents during discovery in products liability cases. Some courts have held that the public policy interest in improving product safety warrants application of the privilege,[97] while other courts reject this application of the privilege.[98] Required documents submitted by a manufacturer to the Consumer Products Safety Commission, which include the manufacturer's critical evaluation of its products, testing, or procedures may be shielded from disclosure in discovery by virtue of the self-critical analysis privilege.[99]

F. Aviation-Related Claims

The self-critical analysis privilege has not proliferated in the aviation context as it has with medical peer reviews and employment discrimination. The cases are inconsistent because of the rationale upon which the decisions are based rather than the outcome. Notably, although the courts in each of the cases discussed below did not always uphold the privilege in the circumstances presented, the purpose behind the self-critical analysis seems particularly strong in the aviation context. This is so because the aviation industry is one in which everyone agrees that the public policy interest in safety is compelling.

---

[95] United States v. Lockheed Martin Corp., 995 F. Supp. 1460, 1465 (M.D. Fla. 1998).

[96] *In re Grand Jury Proceedings*, 861 F. Supp. at 388.

[97] Shipes v. BIC Corp., 154 F.R.D. 301, 307 (M.D. Ga. 1994).

[98] Lawson v. Fisher-Price, Inc., 191 F.R.D. 381, 386 (D. Vt. 1999); Lamitie v. Emerson Elec. Co. – White Rodgers Div., 142 A.D.2d 293, 296 (N.Y. App. Div. 1988).

[99] *Shipes*, 154 F.R.D. at 307 (holding that documents submitted to the CPSC pursuant to 15 U.S.C. § 2065(b) are protected by the self-critical analysis privilege to the extent the information is self-critical evaluation); Roberts v. Carrier Corp., 107 F.R.D. 678, 685 (N.D. Ind. 1985). *But see Lamitie*, 142 A.D.2d at 298.

In a case in the District Court for the Southern District of Florida, *In re Air Crash Near Cali, Colombia on December 20, 1995*,[100] American Airlines (hereinafter "American") asserted the privilege in consolidated lawsuits arising out of the crash of American flight No. 965 on December 20, 1995, in Cali, Colombia.[101] In that case, the plaintiffs' steering committee (hereinafter "PSC"), a nine-member committee representing the plaintiffs, served American with a request for production of documents.[102] American objected to portions of the requests on the grounds that the documents sought were protected by the self-critical analysis privilege, as well as the work product privilege and attorney-client privilege.[103] The trial court held that the documents requested could not be withheld on the basis of the self-critical analysis privilege.[104] American filed a motion for reconsideration to the extent that the order required American to produce documents prepared in conjunction with its Aviation Safety Action Program ("ASAP"),[105] which is a voluntary pilot self-reporting program designed to encourage pilots to report incidents and violations.[106] The ASAP reports—after being de-identified—were reviewed by a joint committee comprised of representatives from American, the FAA, and a pilot's association, that would issue pilot advisories, procedure changes, and individual skill enhancement recommendations.[107] The court rejected the application of the self-critical analysis privilege to the ASAP reports, primarily on the basis that it could not see that the privilege could conceivably prevent *any* discovery of American's post-accident review process.[108] The court reasoned that there would be no "chilling effect" on the review process since

> American has undertaken to 'aggressively investigate' itself not just for purposes of internal quality control, but also in order to prepare a defense to this lawsuit, draft appropriate submissions

---

100 *In re* Air Crash Near Cali, Colombia on Dec. 20, 1995, 959 F. Supp. 1529 (S.D. Fla. 1997).

101 *Id.* at 1530.

102 *Id.*

103 *Id.*

104 *Id.*

105 *Id.* at 1531 (explaining that American's ASAP program, which is called "American Airlines Safety Action Partnership," was a demonstration program initiated in conjunction with the FAA to encourage reporting of incidents in order to improve safety and prevent accidents in the future).

106 *Id.*

107 *Id.*

108 *Id.* at 1533.

> to the NTSB and the Colombian authorities and marshal evidence to present to the media in an effort to ease any public concern."[109]

Furthermore, the court reasoned that "the touchstone of self-critical analysis is that it is an 'in house' review undertaken primarily, if not exclusively, for the purpose of internal quality control."[110] Although the court did not explicitly state that the documents were not within the ambit of the privilege because they were not kept confidential, the court pointed out that the information contained in the pilots' reports was disseminated to the FAA and the pilot's association.[111] Despite finding that the documents were not protected by the self-critical analysis privilege, the court did find that the work product doctrine would protect the impressions and opinions of American's investigation team, and established a limited qualified privilege for ASAP materials, which will be discussed later in this paper.[112] This case is most important for the court's creation of a limited or qualified privilege for the ASAP program.[113] It is important to note, however, that the court did not address the availability of the self-critical analysis protection to pre-accident internal safety reviews.[114]

A federal court considered whether safety meetings within Cessna Aircraft Company (hereinafter "Cessna") regarding its products were protected by the self-critical analysis privilege in *Lloyd v. Cessna Aircraft Co.*[115] Cessna, who was named as a defendant, brought a third-party complaint against the United States.[116] At the deposition of one of Cessna's executive engineers, the government's attorney asked questions pertaining to confidential memoranda of meetings at Cessna's corporate headquarters at which the participants apparently reviewed, analyzed, and evaluated operations for continued improvement of safety.[117] The court held that the circumstances in that case did not warrant the self-critical analysis privilege.[118] Most importantly, as the court aptly pointed out, the government was not

---

109 *Id.*
110 *Id.*
111 *Id.*
112 *Id.* at 1533, 1536.
113 *See id.* at 1533. *See infra* Part III.
114 *See id.* at 1531-36.
115 74 F.R.D. 518, 522 (E.D. Tenn. 1977).
116 *Id.* at 518.
117 *Id.* at 520.
118 *Id.* at 522.

seeking copies of the minutes of the meetings or reports from the meetings, because the dispute arose in the context of a deposition.[119] The court stated "were the government seeking herein to obtain copies of the minutes or other reports of the actual discussions of Cessna's 'top ten' meetings, this Court might be inclined to follow the principles enunciated" in support of the self-critical privilege.[120] The court would then "apply a balancing approach before allowing the wholesale disclosure of the specific details of any such meetings."[121] The *Lloyd* case is important because it does not totally foreclose the protection of pre-accident internal safety reviews by commercial carriers or manufacturers.[122]

A recent case, *Tice v. American Airlines, Inc.*,[123] proves that the self-critical analysis privilege is not dead in aviation-related cases.[124] In that case, retired airline pilots brought an age discrimination lawsuit against American Airlines challenging its policy that forced the pilots to retire after they turned 60 years old.[125] The plaintiffs sought discovery of safety reports commis-

---

119 *Id.*

120 *Id.*

121 *Id.*

122 *See id. But see* Combined Comm. Corp., Inc. v. Pub. Serv. Co. of Col., 865 P.2d 893 (Colo. Ct. App. 1993) (holding that pre-accident safety reviews do not fall within the privilege while post-accident investigations may be protected). In that case, the plaintiffs sued the PSC for the wrongful death of the decedents when a helicopter in which they were riding collided with a transmission line owned by the PSC. *Id.* at 895. This is a bizarre case in the context of self-critical analysis privilege cases because the PSC argued after a jury awarded damages against it that the judge erred in admitting evidence during the trial that before the crash, the PSC had decided to put markers on the transmission lines, but had not marked the line in question. *Id.* at 896. The PSC's argument was one of admissibility and not discoverability, and it was not persuasive due to the context in which it was made. In any event, the court held that the privilege did not prevent the admissibility of the materials. *Id.* at 897. The court did not address the timing of the assertion, but rather reasoned that "the privilege does not protect against the discovery of information developed by routine, internal corporate reviews of matters relating to safety engaged in prior to the incident upon which the litigation is based." *Id.* The court further stated that post-accident investigations may be discouraged if there was no self-critical analysis privilege, but "general pre-accident safety reviews . . . are designed to preempt litigation; it is perverse to assume that candid assessments necessary to *prevent* accidents will be inhibited by the fear that they could later be used as a weapon in hypothetical litigation that they are supposed to prevent." *Id.* at 898. Of course, numerous courts have held otherwise as is demonstrated by the preceding discussions.

123 192 F.R.D. 270 (N.D. Ill. 2000).

124 *Id.*

125 *Id.* at 271.

sioned by American, which were performed by a consulting firm.[126] The plaintiffs did not seek the safety reports for statistical information, but to refute any safety claims American might make in support of its policies.[127] American objected to the reports on the basis of the self-critical analysis privilege.[128] As discussed above, the court pointed out that the determination of the applicability of the self-critical analysis privilege varied depending on whether the case involved personal injury or employment discrimination.[129] The court reasoned that the case at issue was a "hybrid" because it was an employment discrimination case in which the plaintiff sought safety reports designed to enhance safety, and which were prepared pursuant to an FAA mandate.[130] The court found that the situation was more akin to a personal injury case, and applied the test established by the Ninth Circuit in *Dowling v. American Hawaii Cruises.*[131] The court held that the safety reports should be protected by the self-critical analysis privilege although the court did acknowledge that even if the reports were disclosed, it would be somewhat unlikely that American would abandon the safety reports. The court still expressed concern that "flow of internal airline safety information would be curtailed if discovery was allowed."[132]

G. Waiver of the Privilege

The claim of the privilege of self-critical analysis may be waived in certain circumstances.[133] For example, the party claiming the privilege waives it if the party seeks to rely on portions of the documents as an affirmative defense to liability.[134]

---

126 *Id.*

127 *Id.* at 273.

128 *Id.* at 271.

129 *Id.* at 272-73.

130 *Id.* at 273.

131 *Id.* (citing Dowling v. Am. Haw. Cruises, Inc., 971 F.2d 423, 426 (9th Cir. 1992)).

132 *Id.*

133 *See* Burden-Meeks v. Welch, 319 F.3d 897, 899 (7th Cir. 2003); First E. Corp. v. Mainwaring, 21 F.3d 465, 467 (D.C. Cir. 1994); Maxey v. GM, Civ. A. No. 3:95CV6, 1996 WL 737537, at *1 (N.D. Miss. Dec. 16, 1996).

134 EEOC v. Gen. Tel. Co. of N.W., 885 F.2d 575, 578 (9th Cir. 1989) (finding that employer "opened the door" to self-evaluations regarding employment discrimination by using it to prove nondiscrimination); Volpe v. US Airways, Inc., 184 F.R.D. 672, 673 (M.D. Fla. 1998) (holding that US Airways, in objecting to produce the related files in an employment discrimination lawsuit brought by Volpe, waived the self-critical analysis privilege because one of its defenses relied on its investigation and its actions subsequent to the plaintiff's claim).

Furthermore, the failure to interpose the privilege at a deposition may waive the privilege.[135] The appropriate time to raise the self-critical analysis privilege is when the documents are sought by the opposing party during discovery.[136] This is not considered an evidentiary issue because once the other side has obtained the information, the privilege has been waived.[137]

H. Professional and Ethical Considerations

1. Good Faith Assertion of the Privilege

As with any privilege, professionalism and courtesy should be exercised in asserting the privilege. Most importantly, do your homework. Rule 3.1 of the American Bar Association's ("ABA") Model Rules of Professional Conduct provides that "a lawyer shall not bring or defend a proceeding, or assert or controvert an issue" in the proceeding "unless there is a basis in law and fact for doing so that it is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."[138] The Model Rules of Professional Conduct also prohibit attorneys from knowingly making a false statement of law or fact to a court, or failing to disclose to the court "legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel."[139]

The nature of law is that it is "not always clear and never static."[140] This is especially true in the context of the self-critical analysis privilege. As the preceding discussion indicates, the self-critical analysis privilege is not widely accepted and is not uniformly applied. In order to raise the privilege in good faith, it is prudent to conduct research to determine the status of the privilege in the jurisdiction in which your case is pending. It is important to note that few jurisdictions have outright rejected

---

[135] Moloney v. United States., 204 F.R.D. 16, 20 (D. Mass. 2001) (finding that the failure of counsel for the United States to assert the privilege at a deposition when the deponent was questioned regarding the alleged privileged material constituted a waiver of the privilege).

[136] *Id.* at 21.

[137] *Id.*

[138] Model Rules of Prof'l Conduct R 3.1 (2004): Meritorious Claims and Contentions.

[139] *Id.*, R 3.3(a); *see also id.* R 3.4(a) Comment (stating "[a] lawyer shall not . . . unlawfully obstruct another party's access to evidence or unlawfully destroy or conceal a document or other material having potential evidentiary value").

[140] *Id.*, R 3.1 Comment.

the privilege under all circumstances. Even if your jurisdiction has declined to recognize the privilege in employment discrimination cases, it may be inclined to recognize the privilege in the aviation context. A good faith assertion of the privilege can be brought in most jurisdictions as long as you keep in mind that you may have an uphill battle in changing the court's inclination toward limiting available privileges.

Furthermore, as discussed above, a discovery objection based on privilege must be made timely, or it is waived. When a party objects based on privilege, the party must "describe the nature of the documents, communications, or things not produced . . . in a manner that, without revealing information itself privileged . . . will enable [the] other part[y] to assess the applicability of the privilege."[141] Even if the privilege is timely asserted, the privilege may be waived in federal courts if these rules are not followed.[142] In order to avoid waiver, it is advisable to create a privilege log when the objection is first raised.[143]

2. *Fairness To Opposing Counsel*

If you believe that the privilege may become an issue at a deposition of a corporate representative, professionalism suggests that you consider trying to avoid surprising the opposing party with the objection for the first time at the deposition if you have reason to believe that information protected by the self-critical analysis privilege may become an issue. From a practical standpoint as well, it is advisable to attempt to reach some agreement, if possible, prior to the deposition so that your corporate representative will not have to arrange to attend two depositions instead of one. This concern is particularly important in claims of privilege made at a deposition because you should instruct the witness not to answer if the information requested is privileged. Instructing a witness not to answer should not be taken lightly, and you should make sure that you have a good basis for the objection in this context especially. Of course, it is not always possible to anticipate the questions that will be posed by the opposing party at a deposition.

---

141 FED. R. CIV. P. 26(b)(5).

142 *See* Ritacca v. Abbott Labs., 203 F.R.D. 332, 334-35 (N.D. Ill. 2001).

143 *See id.* at 336.

III. AVIATION SAFETY REPORTING PROGRAM (ASRP)

Another area in which the public policy interest in safety has led to immunity is the Aviation Safety Reporting Program ("ASRP"), which is a program that allows pilots, controllers, flight attendants, and maintenance personnel to timely file reports of incidents, which may involve violations of FARs, to qualify for immunity from sanctions related to the incident.[144] The filing of a report under the program, however, does not automatically establish immunity for the reporter as set forth below. Certain procedures must be followed in filing the report, and immunity is only available for acts that were inadvertent and not deliberate.

A. HISTORY AND DEVELOPMENT OF THE ASRP

The ASRP was established in 1975 by the FAA to encourage the reporting of information regarding unsafe conditions in the aviation system in the United States.[145] To obtain as much information as possible, the ASRP provided for immunity from sanctions for FAA violations if the violation was reported to the FAA, and all of the reporting requirements were met.[146] The requirements for the applicability of the initial ASRP were contained in FAA Advisory Circular 00-46 (1975).[147] In 1976, the ASRP was changed to direct the reports to be sent directly to the National Aeronautics and Space Administration ("NASA") to encourage reporting by ensuring confidentiality.[148] Submission of the report provided immunity from sanctions for the person making a timely filed report.[149] Immunity, however, was not applied "with respect to reckless operations, criminal offenses, gross negligence, willful conduct and accidents."[150]

---

144 *See* FAA Advisory Circular 00-46D (1997) (referring to the program as the Aviation Safety Reporting System ("ASRS")).

145 Airport Development Aid Program, 44 Fed. Reg. 18,128 (Mar. 23, 1979); *see also* 14 C.F.R. § 91.25 (2004).

146 14 C.F.R. § 91.25; 44 Fed. Reg. 18,128.

147 *See* FAA Advisory Circular 00-46D (1997).

148 *See* FAA Advisory Circular 00-46A (1976); *see also* 44 Fed. Reg. 18,128 (Mar. 23, 1979).

149 44 Fed. Reg. 18,128 (Mar. 23, 1979).

150 FAA Advisory Circular 00-46A (1976) (narrowing the immunity provided by the NASA reports the circular stated that a person who submitted a report to NASA could not be sanctioned unless the FAA approached NASA to inquire about a particular incident within 45 days of the incident); *see also* Ferguson v. NTSB, 678 F.2d 821, 827 (9th Cir. 1982) (specifying that reckless conduct was

In 1979, the FAA issued Advisory Circular 00-46B, changing the express exclusion for reckless conduct from the scope of immunity. However, it did allow immunity from punishment, for independently discovered violations, even then only if certain requirements were met.[151] One of the requirements for the applicability of waiver of sanctions in FAA Advisory Circular 00-46B was that the FAA violation was "inadvertent and not deliberate."[152] The current ASRP, contained in FAA Advisory Circular 00-46D, includes the requirement that the violation be "inadvertent and not deliberate" as well.[153] It provides that "[t]he effectiveness of this program in improving safety depends on the free, unrestricted flow of information from the users of the NAS [National Airspace System]."[154] The FAA uses the information to remedy defects or deficiencies and to improve the current system and plan for the future system.[155]

B. Sanction Waiver and Prohibition Against FAA's Use of ASRP Reports

The timely filing of an ASRP report to NASA prohibits the FAA from enforcing sanctions against the reporter as long as the specific requirements of the ASRP are satisfied.[156] For example, a pilot who reports an inadvertent deviation from clearance will not have his certificate suspended or revoked as long as the ASRP requirements are satisfied; however, the FAA may still proceed with an enforcement action against the reporter based on information not contained in the report and waive the sanction due to the timely filing of the report.[157]

Another important aspect of the ASRP is that the FAA is prohibited from using the reports or any information derived from

---

excluded from sanction immunity if the FAA independently obtained information regarding the occurrence).

151 *See* FAA Advisory Circular 00-46B (1979).

152 *See id.*

153 FAA Advisory Circular 00-46D (1997) (canceling the previous Advisory Circular 00-46C, which cancelled its predecessors).

154 *Id.*

155 *Id.*

156 *See* Adm'r v. Seyb, No. EA-5024, 2003 WL 554658, at *3 (N.T.S.B. Feb. 25, 2003).

157 *See id.* (holding that a pilot who inadvertently landed on the wrong runway violated 14 C.F.R. §§ 91.123(a), 91.129(i), and 91.13(a) of the Federal Aviation Regulations ("FARs"), but holding that FAA waived the sanction because the pilot filed a timely NASA report).

the reports for enforcement purposes.[158] Therefore, if the FAA pursues an enforcement action against a pilot who has filed a timely NASA report, the FAA may not use the information contained in the report to pursue the charges in an enforcement action; rather it must utilize evidence and information independent of the contents of the report.[159] In addition, if the FAA becomes aware of a violation from a source other than the report, by witness reports, for example, it may take appropriate action and base its enforcement action on the witness statements and other evidence.[160]

It is important to note that the immunity policy and the prohibition against use of the report and information derived from the report do not apply to actions or lack of action involving a criminal offense, accident or action that shows a lack of qualification or competency.[161]

C. Procedures for Filing and Processing

In order to preserve sanction immunity, the reporter must, within ten (10) days after the occurrence of the operational error or deviation, complete and deliver or mail the written report to NASA.[162] Information concerning the ASRP system reporting forms can be obtained from http://www.asrs.arc.nasa.gov.[163] There is a general form for use by pilots, dispatchers, and airport personnel, and specific separate forms are available for air traffic controllers, mechanics, and cabin crew.[164]

Once NASA receives the completed form, it is initially screened for information concerning criminal offenses (matters which will be referred to the Department of Justice and FAA), and information concerning accidents (which will be referred to the NTSB and FAA).[165] After the initial screening, NASA deidentifies the report by removing all personal and organizational names from the report before entering it into the database which contains all reports not involving criminal activ-

---

158 FAA Advisory Circular 00-46D; *see also* 14 C.F.R. § 91.25.

159 *See Seyb*, 2003 WL 554658, at *13.

160 FAA Advisory Circular, 00-46D.

161 *Id.*; 14 C.F.R. § 91-25 (2004); Facility Operations and Administration Handbook, 7210.3M, para. 2-2-9.

162 Facility Operations and Administration Handbook, 7210.3M, para. 2-2-9.

163 ASRS: Program Overview, Confidentiality and Incentives to Report (Aug. 26, 2004), *at* http://www.asrc.arc.nasa.gov/overview_nf.html.

164 *Id.*

165 FAA Advisory Circular 00-46D.

ity or an accident.[166] Dates, times and related information, which might be used to infer an identity, are either generalized or eliminated.[167] The tear-off portion of the report, which contains the reporter's name, "will be removed by NASA, time stamped, and returned to the reporter as a receipt."[168] The receipt should be maintained by the reporter to prove that he filed a timely report in order to obtain immunity as long as all other requirements have been satisfied.[169]

NASA also analyzes the information contained in the report, which is included in periodic reports of findings that are available to the public, and the FAA.[170] The ASRP database, which is accessible on the website, contains samplings of reports classified into categories such as flight crew fatigue, air traffic controller reports, fuel management issues, passenger misconduct reports, runway incursions, wake turbulence reports, and numerous other categories.[171]

D. "Inadvertent and not Deliberate" Requirement

The interpretation and application of the term "inadvertent and not deliberate" in the context of the ASRP has given rise to numerous administrative law opinions and decisions issued by the National Transportation Safety Board (NTSB).[172] The decisions typically arise from disputes between the FAA and the violator who submitted a NASA report as to whether the violator's actions were "inadvertent and not deliberate" under the ASRP.[173] Of course, often the FAA seeks imposition of a sanction even though the violator filed a timely NASA report regarding the incident because the FAA views the violations as *not* "inadvertent and not deliberate."[174] Although NTSB decisions

---

166 *See id.*

167 ASRS: Program Overview, Confidentiality and Incentives to Report (Aug. 26, 2004), at http://www.asrc.arc.nasa.gov/overview_nf.html.

168 FAA Advisory Circular 00-46D.

169 *See* Adm'r v. Cain, No. SE-16342, 2001 WL 1474219, at *10 (N.T.S.B. Sept. 25, 2001) (holding that certified return receipt is not sufficient to prove the timely filing of a NASA report because the Advisory Circular states the sole evidence of filing is the "return slip").

170 ASRS: Program Overview, Report Processing (Aug. 26, 2004), *at* http://www.asrc.arc.nasa.gov/overview_nt.html.

171 ASRS: Program Overview, Database (Aug. 26, 2004), *at* http://www.asrc.arc.nasa.gov/overview_nf.html.

172 FAA Advisory Circular 00-46D.

173 *See* Ferguson v. NTSB, 678 F.2d 821, 826 (9th Cir. 1982).

174 *See id.*

and Administrative Law Judge (ALJ) decisions do not provide substantial analysis of the meaning of "inadvertent and not deliberate," certain categories of treatment can be discerned.[175]

The most frequently cited case regarding the interpretation of "inadvertent and not deliberate" within the ASRP is *Ferguson v. NTSB.*[176] In that case, a pilot landed at the wrong airport primarily due to his failure to take certain precautions and to verify information.[177] The pilot did not know that he had landed the plane at the wrong airport until after the landing.[178] The pilot filed a timely NASA report.[179] The FAA argued that the sanctions for the violation should not be waived under the ASRP because the pilot's actions did not meet all of the requirements for applicability contained in Advisory Circular 00-46B (a predecessor to the current ASRP advisory circular 00-46D).[180] The FAA claimed that the mistake was not "inadvertent and not deliberate."[181] The Ninth Circuit extensively discussed the meaning and applicability of the requirement.[182]

The court affirmed the NTSB's holding that for the waiver to apply the violation must be both inadvertent *and* not deliberate.[183] The basis of this holding is that the terms are used in the conjunctive rather than the disjunctive.[184] The Ninth Circuit pointed out that the FAA did not contend the violation was deliberate, but it did argue that the violation was not inadvertent.[185] The court stated that in each instance in which the pilot failed to comply with FAA regulations, the violation was the result of a "purposeful choice."[186] For example, the pilot "chose" not to familiarize himself with all flight information or to use navigational aids.[187] The court stated that "[i]t is evident that an

---

175 *See id.* at 828.

176 *Id.* at 821.

177 *See id.* at 824.

178 *See id.* at 825.

179 *Id.*

180 *Id.* at 826.

181 *Id.*

182 *See id.*

183 *Id.* at 828.

184 *Id. See also* Adm'r v. Wardenaar, No. SE-15733, 2000 WL 425843, at *8 (N.T.S.B. Mar. 15, 2000).

185 *Ferguson*, 678 F.2d at 828.

186 *Id.*

187 *Id.*

inadvertent act is one that is not the result of a purposeful choice."[188] The court provided the following useful analogy:

> Thus, a person who turns suddenly and spills a cup of coffee has acted inadvertently. On the other hand, a person who places a coffee cup precariously on the edge of a table has engaged in purposeful behavior. Even though the person may not deliberately intend the coffee to spill, the conduct is not inadvertent because it involves a purposeful choice between two acts—placing the cup on the edge of the table or balancing it so that it will not spill. Likewise, a pilot acts inadvertently when he flies at an incorrect altitude because he misreads his instruments. But his actions are not inadvertent if he engages in the same conduct because he chooses not to consult his instruments to verify his altitude.[189]

The court held that the pilot's actions were not "inadvertent" even though he did not consciously intend the particular consequences that occurred as a result of his elective actions.[190] This case has been used to support numerous NTSB decisions that deny violators' immunity under ASRP based on minute distinctions between an inadvertent, unintentional mistake and a purposeful, intentional violation.

Several NTSB and FAA decisions, however, do not take such a hard line as the Ninth Circuit did in distinguishing between actions protected by the ASRP immunity and those that are not.[191] In fact, the federal courts and the NTSB are bound by the FAA's own interpretation of FAA rules.[192]

For example, in *Administrator v. Ferguson*, the Administrator sought a 45-day suspension of a pilot's certificate for departing with ice and icicles on the elevator control system of the Cessna

---

[188] *Id.* at 828-29. The court relied on the definition of "inadvertence" in Ballentine's Law Dictionary, which defines "inadvertence" as "the effect of inattention, the result of carelessness, oversight, mistake, or fault of negligence and the condition of character of being inadvertent, inattentive or heedless . . . . Gross negligence is not inadvertence in any degree." *Id.* at 828. The court also pointed out that the lay definition of "inadvertent" contained in Webster's Dictionary is consistent with the legal definition, which defines "inadvertent" as "not paying strict attention; failing to notice or observe; heedless; wary." *Id.* at 829.

[189] *Id.* at 828.

[190] *Id.* at 829 (appearing not to strictly comport with either legal or lay definitions of "inadvertent" or "inadvertence," which include carelessness, oversight, and inattention).

[191] *See* Adm'r v. NTSB, 190 F.3d 571 (D.C. Cir. 1999).

[192] 49 U.S.C. § 44709(d)(3) (2004). *See id.* at 577 (citing Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 147 (1991)).

208.[193] The pilot filed a timely ASRP report,[194] and claimed that he checked the elevator system for ice prior to flight. The Administrative Law Judge found that the pilot was entitled to waiver of the sanction under ASRP.[195] On appeal, the Administrator argued that the pilot was not entitled to ASRP protection because the pilot's failure to discover the ice was not "inadvertent."[196] The Board denied the Administrator's appeal and stated:

> At some level of analysis, every act can be considered purposeful in that a choice is made, even a choice whether to be more careful or less careful. The Administrator's argument here that respondent, in effect, was purposeful in a choice not to look as carefully for ice as was necessary does not reflect the distinction intended for ASRP purposes . . . the intent of the ASRP is to exclude sanction waiver for conduct that approaches deliberate or intentional conduct in the sense of reflecting a 'wanton disregard of the safety of others' or a 'gross disregard for safety.'[197]

Therefore, some Board decisions seem to contradict the Ninth Circuit's analysis in the sense that one is entitled to waiver unless the circumstances show that the violator exercised a complete disregard for safety.[198]

The same type of violation may or may not be entitled to ASRP immunity depending on the judge who hears the case or possibly the attorney acting on behalf of the Administrator. For example, pilots who flew below flight clearances have been denied ASRP immunity, while pilots who fail to follow clear instructions to hold short on a runway are entitled to ASRP immunity.[199] The bottom line is that the application of ASRP

---

[193] Adm'r v. Ferguson, No. EA-4457, 1996 WL 306261, at *1 (N.T.S.B. May 15, 1996).

[194] *See id.*

[195] *Id.*

[196] *Id.*

[197] *Id.* (quoting Adm'r v. Fay, 7 N.T.S.B. 951, NTSB No. EA-3316 (May 15, 1991)).

[198] *See* Adm'r v. Ferguson, 1996 WL 306261, at *1; Ferguson v. NTSB, 678 F.2d 821, 826 (9th Cir. 1982).

[199] *See, e.g.*, Adm'r v. Kennedy, No. SE-13399, 1994 WL 804030, at *1, *10 (N.T.S.B. Oct. 2, 1994) (flying below flight clearances - ASRP waiver of sanction denied); Adm'r v. Cardozo, 7 N.T.S.B. 1186, at #1 (1991) (flying below flight clearances—ASRP waiver of sanction denied); Adm'r v. Mann, No. SE-11162, 1990 WL 339564; at *2, *5 (N.T.S.B. Nov. 1, 1990) (flying below flight clearances—ASRP waiver of sanction denied); Adm'r v. Paulson, No. SE-14206, 1996 WL 784848, at *2, *13 (N.T.S.B. Mar. 21, 1996); Adm'r v. Farley, No. SE-13830, 1995 WL 623860, at *2, *5 (N.T.S.B. Jan. 18, 1995) (passing beyond the hold-

immunity is not applied consistently to the same types of violations.

Even in cases where it was determined that the pilot took off without clearance from the ATC, the ASRP was found to apply.[200] In *Administrator v. Tinsley*,[201] the pilot of a Beech C-90 requested an IFR clearance from the tower.[202] He was told to stand by.[203] Before the IFR clearance was given, the pilot announced that he was taking off VFR and would get his IFR clearance after he was in the air.[204] The pilot testified that he had received reports that it was VFR conditions and it appeared to be VFR conditions to him.[205] The official weather report for the time of takeoff was IFR.[206] The Board determined through the evidence presented that the conditions were actually VFR at the time of departure.[207] Therefore, the Board concluded that

> [M]y finding that it was VFR at that time negates any finding of a careless or reckless operation, a violation of FAR 91.9, because if the aircraft is being operated VFR in VFR conditions, I don't see how there has been any showing in the evidence here today that there was any endangerment to life or property of another.[208]

The Board, however, did find that the pilot violated 14 C.F.R. § 91.75(b) by failing to wait for an IFR clearance since the official weather conditions were IFR, regardless of the actual weather conditions.[209] The Board held that the pilot was entitled to waiver of the sanction because he filed a timely NASA report.[210]

A pilot's violation of a carrier's own FAA-approved operations specifications can be a basis for the FAA to argue that the viola-

---

short line—ASRP waiver of sanction granted); Adm'r v. Smead, No. EA-4021 (N.T.S.B. Nov. 4, 1993) (failure to hold short—ASRP waiver of sanction granted).

200 *See* Adm'r v. Tinsley, No. SE-12131, 1992 WL 436535 (N.T.S.B. Oct. 20, 1992).

201 *Id.*

202 *Id.* at *1.

203 *Id.*

204 *Id.*

205 *Id.* at *2.

206 *Id.*

207 *Id.* at *4.

208 *Id.*

209 *Id.*

210 *Id. See also* Adm'r v. Bushell, No. EA-3912, 1993 WL 226008 (N.T.S.B. Jun. 8, 1993) (taking off without clearance due to miscommunication with ATC entitled the pilot to ASRP immunity).

tion was not "inadvertent and not deliberate."[211] For example, in *Administrator v. Hunsucker*,[212] a pilot for Ozark Air Lines violated the airline's operating specifications which required that, when operating into airports which do not have Air Traffic Control Tower services under VFR, "the pilot shall be in direct communications with the Flight Service Station or air/ground radio communication facilities capable of providing airport traffic advisory services."[213] The violation occurred when, upon descent, the pilot failed to contact the flight service station or any other air/ground radio communications facility, given that there was no Air Traffic Control Tower at the airport, and in violation of the operating specifications.[214] The pilot filed a timely NASA report under the ASRP.[215] The Administrator determined that the pilot was entitled to immunity of the sanction under ASRP.[216]

At least one decision, *Administrator v. Whicker*,[217] implies that violation of FAA-approved flight procedures may be a basis to find that the violation was intentional.[218] In that case, the Administrator sought sanctions against a pilot who operated an MD-88 on a commercial flight that ran off the end of the runway upon landing.[219] The Administrator claimed that the incident occurred because the pilot did not perform a go-around, as required by the carrier's FAA-approved cockpit procedures, when a stabilized approach was not achieved.[220] All parties agreed that the carrier's operating specifications were binding upon the pilot.[221] The judge found that the pilot violated the carrier's own operating procedures by failing to initiate a go-

---

211 *See* Adm'r v. Hunsucker, No. EA-2347, 1986 WL 82480 (N.T.S.B. June 27, 1986).

212 *Id.*

213 *Id.* at *1.

214 *Id.* 14 C.F.R. § 121.2(d) (2004) (prohibiting the operation of an aircraft in violation of the operations specifications issued for the air carrier under Part 121).

215 *Hunsucker*, 1993 WL 226008, at *2.

216 *Id. See also* Adm'r v. Curry, No. EA-2294, at *1-2 (N.T.S.B. Mar. 18, 1986) (allowing sanction immunity under ASRP where pilot failed to use approved cockpit check procedures for the exterior air inlet ducts prior to takeoff).

217 Adm'r v. Whicker, No. SE-15613, 1999 WL 1335095 (N.T.S.B. Sept. 20, 1999), *aff'd by* Adm'r v. Whicker, No. EA-4959, 2002 WL 406984 (N.T.S.B. Mar. 11, 2002).

218 *See id.* at *10.

219 *Id.* at *1.

220 *Id.*

221 *Id.* at *3.

around, as required by the carrier's Flight Operations Manual and Pilot Operations Manual, when he was unable to establish a stabilized approach.[222] Additionally, the judge found that there was no reasonable explanation for why the pilot did not initiate a go-around as required.[223] The judge further held without discussion that the pilot was not entitled to ASRP immunity because the failure to initiate the go-around was a "conscious and deliberate decision."[224] The decision was affirmed on appeal.[225]

IV. AVIATION SAFETY ACTION PROGRAM (ASAP)

Another example of the creation of a privilege for the benefit of the public interest in safety is the qualified immunity and privilege available for evaluations created pursuant to the FAA's voluntary Aviation Safety Action Program ("ASAP"), which is similar in some respects to the ASRP.[226] The FAA designed ASAP "to encourage air carriers and repair station employees to voluntarily report safety information that may be critical to identifying potential precursors to accidents."[227] The goal of ASAP is to resolve safety issues through corrective action rather than punishment or discipline.[228] The FAA's Advisory Circular concerning ASAP establishes guidelines for Part 121 carriers and repair stations to set up ASAP programs in conjunction with the FAA and third parties, such as the effected employees' labor unions.[229] The program was initiated through demonstration programs such as USAir Altitude Awareness Program, the American Airlines Safety Action Partnership, and the Alaska Airlines Altitude Awareness Program, and over two dozen additional programs have since been established.[230] The FAA will not pursue enforcement actions against a person who makes an ASAP report as long as the qualifications for the report are satisfied, and

---

[222] *Id.* at *10.

[223] *See id.*

[224] *Id.* (finding that even the first pilot for the flight was also subject to an enforcement action, but that his failure to properly confirm the deployment of the spoilers was inadvertent and not deliberate).

[225] Adm'r v. Whicker, No. EA-4959, 2002 WL 406984 (N.T.S.B. Mar. 11, 2002).

[226] *See* FAA Advisory Circular 120-66B (2002).

[227] *Id.*; FAA Order No. 1110.129 (July 3, 2003) (establishing the ASAP Aviation Rulemaking Committee ("ARC") to serve as a forum for interaction among the FAA, industry employee groups, airlines, and repair stations regarding ASAP goals, issues, and concerns).

[228] FAA Advisory Circular 120-66B (2002).

[229] *Id.* at 4.

[230] *Id.* at 2.

at least one federal court has held that ASAP reporters are entitled to qualified immunity in civil litigation.[231]

A. Immunity from Enforcement Actions

The FAA guidelines regarding the ASAP program provide that the FAA will not use the content of any ASAP report in any subsequent enforcement action as long as the specific requirements of the program have been satisfied.[232] Each carrier or repair station will design its own plan in conjunction with the FAA, but must adhere to the FAA-established guidelines and obtain specific approval from the FAA for the program.[233]

In order to come within ASAP protection, the report must be timely.[234] A report will be considered timely if it is filed within twenty-four hours of the event, or within twenty-four hours after the reporter became aware of the event.[235] The twenty-four hour time requirement is not a hard and fast rule because the Event Review Committee (ERC), which is comprised of representatives of the certificate holder, FAA and union, may determine that the report was filed timely upon a consideration of the specific circumstances.[236] Moreover, "the alleged regulatory violation must be inadvertent, and must not appear to involve an intentional disregard for safety."[237] Although the term "inadvertent" is not defined in the Advisory Circular, the meaning will likely be defined by the FAA's interpretation of the terms in other contexts, such as the ASRP.[238] In addition, the reported event must not appear to involve "criminal activity, substance abuse, controlled substances, alcohol, or intentional falsification."[239] Finally, ASAP immunity is not available to the reporter if the "events . . . occurred when NOT acting as an employee of the certificate holder."[240] This is important to note because a pilot employed by a commercial air carrier with an ASAP program should not report any discrepancies within the ASAP pro-

---

231 *Id.* at 7, 14; Tom Longridge, Changes to ASAPAC, ASAP Symp. (20-21 No. 2002), *available at* http://www.asy.faa.gov/proactive/FOOA_&_ASAP/ASAP_Policy_Chgs.pdf (lasat visited Dec. 12, 2002).

232 FAA Advisory Circular 120-66B at 7.

233 *Id.* at 4-5.

234 *Id.* at 7.

235 *Id.*

236 *Id.*

237 *Id.*

238 *See id.*

239 *Id.* at 8.

240 *Id.* at 9.

gram that the pilot may have encountered while flying outside the scope of his employment.[241] In such circumstances, the pilot should restrict reports of the discrepancy to the ASRP to maintain protection from sanctions.[242]

The determination of whether a specific report meets the criteria for inclusion in the ASAP will be determined by the ERC.[243] Any non-complying reports will be forwarded to the FAA for appropriate enforcement action.[244] Neither the report nor contents of the report will be used for FAA enforcement purposes unless the report involves criminal activity, substance abuse, controlled substances, alcohol, or intentional falsification.[245]

B. Confidentiality and Qualified Privilege

The FAA recently issued FAA Order 8000.82 on September 3, 2003, which provides that information received from the FAA or any other government agency pursuant to the ASAP is protected from public disclosure in accordance with 14 C.F.R. part 193.[246] Disclosure is prohibited even with regard to requests made pursuant to the Freedom of Information Act.[247] The policy reason for the order stated by the FAA is that "withholding ASAP information from disclosure is consistent with the FAA's safety and security responsibilities because, unless the FAA can provide assurance that it will not be disclosed, the FAA will not receive the information."[248]

Information protected from disclosure includes the ASAP report, the contents of the report, the identity of the certificate holder associated with the ASAP report, the name of the employee who submits the report, information from an ERC inves-

---

241 *See id.*

242 *See* Aviation Safety Reporting System, 44 Fed. Reg. 18128 (Mar. 23, 1979).

243 FAA Advisory Circular 120-66B at 6.

244 *Id.* at 8.

245 *Id.* at 9.

246 FAA Order No. 8000.82 (Sept. 3, 2003) ("Designation of Aviation Safety Action Program (ASAP) Information As Protected From Public Disclosure Under 14 CFR Part 193"). *See also* 14 CFR § 193.11 (2004) (continuing implementation of the statute); 49 U.S.C. § 40123(a) (1996) (providing that certain safety and security information voluntarily provided to the FAA is protected from disclosure in order to encourage people to provide the information to the FAA); 68 Fed. Reg. 38,594 (2003) (issuing similar protection for information received from the FAA under the Flight Operational Quality Assurance Program ("FOQA")); FAA Order No. 8000.81.

247 FAA Order No. 8000.82.

248 *Id.*

tigation of the report, "evidence gathered by the ERC during its investigation, statistical analysis and trend information provided by the certificate holder that is based on events reported under the certificate holder's ASAP," "a certificate holder's database of reports and events collected over time," and "corrective action on sole source reports when corrective action is successfully completed."[249] ASAP reports involving possible "criminal activity, substance abuse, controlled substances, alcohol, or intentional falsification are" exempted from the order prohibiting disclosure.[250]

In 1994, American Airlines and a pilot's association in conjunction with the FAA created their own version of the ASAP, the American Airlines Safety Action Partnership, in order "to identify and reduce or eliminate possible flight safety concerns, as well as to minimize deviations from Federal Aviation Regulations."[251] American's ASAP is a voluntary self-reporting program designed to report incidents and violations, including deviations during "flight, taxiway or runway incursions during ground operations, and navigational or terrain-avoidance problems."[252] The operation of the program is similar to the ASRP in that it allows pilots to make reports of problems that may involve a violation of the FARs.[253] Like the ASRP, the reports are de-identified and reviewed on a weekly basis by American, the pilot's association, and the FAA, who may issue advisories, procedure changes or individual enhancement training to improve safety.[254]

A federal district court held that American's ASAP reporters are entitled to qualified immunity in civil litigation in *In re Air Crash Near Cali, Colombia on Dec. 20, 1995*.[255] In that case, which is discussed in part II above, American Airlines argued that documents prepared pursuant to its ASAP were entitled to a qualified privilege in a case involving the crash of American Airlines

---

249 *Id.*

250 *Id.*

251 *See In re* Air Crash Near Cali, Colom. on Dec. 20, 1995, 959 F. Supp. 1529, 1531 (S.D. Fla. 1997).

252 *Id.*

253 *Id.*

254 *Id.* (stating that although the program was initially restricted to flight crews, it was later expanded to include dispatch and maintenance departments). *See* Evan P. Singer, *Recent Developments in Aviation Safety: Proposals to Reduce the Fatal Accident Rate and the Debate Over Data Protection*, 67 J. AIR. L. & COM. 499, 526 (2002).

255 Singer, *supra* note 254, at 527.

Flight No. 965, near Cali, Colombia.[256] American argued that there was a compelling public interest in improving safety of commercial travel, and that disclosure of the reports would suppress the pilots from reporting violations of the FARs for fear of dissemination of the information.[257] The court agreed stating: "without a privilege, pilots might be hesitant to come forward with candid information about in-flight occurrences, and airlines would be reluctant, if not altogether unwilling, to investigate and document the kind of incidental violations and general flight safety concerns whose disclosure is safeguarded by the ASAP program."[258]

The court also noted that "[t]here is a genuine risk of a meaningful and irreparable chill from the compelled disclosure of ASAP materials in connection with the pending litigation."[259] The *Cali* court stressed that the privilege would be qualified, and could be overcome by a "highly particularized" showing of need by the party seeking the documents.[260] Since *Cali,* there have been no reported cases involving the qualified privilege for ASAP reports.[261]

V. THE *MACHIN* PRIVILEGE: MILITARY AIRCRAFT ACCIDENT INVESTIGATIVE REPORTS

Yet another example of a privilege established to protect and encourage the free flow of safety information is the *Machin* privilege for military aircraft accident investigative reports.[262] After an accident involving a military aircraft, the branch of the military involved conducts two wholly separate, independent investigations: a "collateral investigation" and a "safety investigation"

---

256 *In re Air Crash Near Cali, Colom. on Dec. 20, 1995,* 959 F. Supp. at 1532 (rejecting American's argument that the ASAP documents were protected by the self-critical analysis privilege).

257 *Id.* at 1534.

258 *Id.*

259 *Id.* at 1535.

260 *Id.* at 1536.

261 Singer, *supra* note 254, at 527.

262 *See* Machin v. Zuckert, 316 F.2d 336 (D.C. Cir. 1963). In *Machin,* the court noted that the military and state secrets privilege allows the United States and branches of the military to block discovery in a lawsuit of any information that, if disclosed, would adversely affect national security. *Id.* at 339. "Even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake." United States v. Reynolds, 345 U.S. 1, 11 (1953).

with separate investigating teams.[263] "The collateral investigation is conducted to preserve available evidence for use in claims, litigation, disciplinary actions, administrative proceedings, and all other purposes."[264] Witnesses in the collateral investigation testify under oath and generally are protected by the procedural safeguards that are applicable in other formal hearings."[265] The entire record of collateral investigations is publicly available.[266]

The other investigation, a safety investigation, is conducted by a specially appointed tribunal that prepares a report for the "sole purpose of taking corrective action in the interest of accident prevention."[267] It is an attempt to "secure the quality of information and candid opinions required in order to identify the specific causes of the accident and thus prevent its repetition."[268] In order to encourage witnesses to speak fully and frankly, they are not sworn and the witnesses receive assurances that their statements will not be used for any purpose other than accident prevention.[269] Personal opinions and speculation are invited by the witnesses, and statements against interest are frequently obtained.[270]

In the seminal case, *Machin v. Zuckert*,[271] confidential statements made to military air crash safety investigators were held to be privileged during pre-trial discovery.[272] In *Machin*, a plaintiff who sued United Aircraft Corporation, a manufacturer of propeller assemblies served the Air Force with a subpoena for its aircraft investigation report of an incident where he was injured in a crash of an Air Force B-25 bomber.[273] The Government

---

263 United States v. Weber Aircraft Corp., 465 U.S. 792, 795 (1984). Depending on the military branch, the names of the two reports vary. For example, the Navy's publicly available report is called the "Judge Advocate General Manual's Investigations." Sometimes the "safety investigation" report is referred to as the "mishap report."

264 *Id.*

265 *Id.*

266 *Id.* (citing A.F. Reg. 110-14, ¶ 1(a) (July 18, 1977)).

267 *Id.* (citing A.F. Reg. 127-4, ¶ 19(a)(1) (Jan. 1, 1973)).

268 Badhwar v. United States Dep't of the Air Force, 829 F.2d 182, 183 (D.C. Cir. 1987).

269 *Id.* at 185.

270 Cooper v. Dep't of the Navy of the United States, 558 F.2d 274, 276 (5th Cir. 1977).

271 316 F.2d 336 (D.C. Cir. 1963).

272 *See id; see also* McDonnell Douglas Corp. v. United States, 323 F.3d 1006 (Fed. Cir. 2003).

273 *Machin*, 316 F.2d at 337.

claimed that the documents were privileged.[274] The court agreed, and stated "when disclosure of investigative reports obtained in large part through promises of confidentiality would hamper the efficient operation of an important Government program and perhaps even, as the Secretary here claims, impair the national security by weakening a branch of the military, the reports should be considered privileged."[275]

Since *Machin*, courts have applied the privilege to requests for information and documents contained in the military's safety investigations of air crashes.[276] The *Machin* privilege has been reaffirmed even in suits filed under the Freedom of Information Act ("FOIA").[277] In the context of air crash cases, the plaintiff brings suit against the United States under the FOIA after it refuses to produce its safety investigation reports to the plaintiff in response to a subpoena in the plaintiff's case against the manufacturer of the aircraft or one of its parts.[278] The Supreme Court extended the *Machin* privilege to FOIA cases in *United States v. Weber Aircraft Corp.*[279] In *Weber*, the plaintiff claimed that he was entitled to the statements made by witnesses during the Air Force's safety investigation.[280] The Court found that the witnesses' statements were within the *Machin* privilege, which protects the statements from discovery in civil litigation and they are not available to any party other than the Air Force.[281] The Court also found that Exemption 5 of the FOIA, which provides that "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency," are not subject to disclosure under the FOIA, incorporating the *Machin* privilege.[282] Accordingly, a person may not obtain privileged portions of an air crash safety investigation through a FOIA request.[283]

---

274 *Id.*

275 *Id.* at 339.

276 *See, e.g.*, United States v. Weber Aircraft Corp., 465 U.S. 792, 802 (1984); Cooper v. Department of the Navy of the United States, 558 F.2d 274, 275 (5th Cir. 1977); Badhwar v. United States Dep't of Air Force, 829 F.2d 182, 183 (D.C. Cir. 1987).

277 *Cooper*, 558 F.2d at 275, 277.

278 *See id.* at 275.

279 465 U.S. 792 (1984).

280 *Id.* at 796.

281 *See id.* at 802, 803.

282 *Id.*

283 *See id.* at 802.

In *Badhwar v. United States Department of Air Force*,[284] the Court of Appeals for the District of Columbia articulated a qualification to the *Machin* privilege by noting that certain factual findings contained in safety investigation reports could be revealed without suppressing such investigations in the future.[285] The court held that the *Machin* privilege protects factual information contained in the safety investigation reports if such information would compromise the promise of confidentiality, or "otherwise reflects official deliberations or recommendations as to policies that should be pursued."[286] "This test is adequate to distinguish between those employees whose statements are not privileged (e.g. non-implicated mechanics reporting on the wreckage) and those whose candor depends on the assurance of non-disclosure."[287] Statements and facts volunteered by technical representatives in the aviation industry or contractors who assist in the investigation may be therefore protected under these circumstances, even in the context of an FOIA request.[288]

A recent case, *In re Petition of McAllister Towing & Transportation Co., Inc.*,[289] illustrates the nexus between the *Machin* privilege and the self-critical analysis privilege. In that case, a district court held that the Navy's "mishap report" was protected from disclosure pursuant to the self-critical analysis privilege.[290] Although *Machin* would certainly be implicated, the court did not address the privilege; but rather, based its holding on the self-critical analysis privilege.[291] This case illustrates the courts' continued public policy concern in protecting self-critical analysis in the interest of safety while weighing the private litigant's need for such reports.

It is unclear whether the self-critical analysis and other privileges regarding self-critical reports will continue to permeate civil litigation. It is apparent, however, that such privileges have a place in contexts, such as aviation, in which the goal of safety for the public overrides an individual litigant's desire to discover such information in order to obtain civil damages.

---

284 829 F.2d 182, 183 (D.C. Cir. 1987).

285 *Id.* at 185.

286 *Id.*

287 *Id.* at 184 (citing *Machin*, 316 F.2d at 339).

288 *See id.*

289 No. Civ. A. 02-858, 2004 WL 1240667, *1 (E.D. Pa. May 7, 2004).

290 *Id.* at * 1.

291 *Id.*


SOUTHERN METHODIST UNIVERSITY
DALLAS, TEXAS

Casenote


SOUTHERN METHODIST UNIVERSITY
DALLAS, TEXAS